



Discrimination Law Review

Submissions of the Law Society of Hong Kong

The Law Society has reviewed the Consultation Paper on Discrimination Law Review issued by the Equal Opportunities Commission released in July 2014 and provides the following responses.

As a matter of general observation, the Law Society notes that a number of questions posed in the Consultation Paper relate to policy matters. These are not within the scope of the review by the Law Society.

The responses below follow the page numbering and the format of questions structured in the Consultation Paper. A reference to “he” or “man” in the following paragraphs is intended to be gender-neutral, unless otherwise specified.

General Remarks

1. By way of general remarks, the Law Society considers that some of the EOC’s proposals appear to be a shift from anti-discrimination to one of ensuring employers to take positive steps to promote equality¹. This is perhaps a policy decision for Government requiring more detailed investigation, as opposed to merely tinkering with the language in statutory provisions.
2. In the process of formulating such policy, and without expressing views on desirability of such policy, the Law Society notes that there is a need to look to the mischief (including actual issues faced by employees in HK) that is sought to be remedied. We also comment that the omission of de facto status

¹ For a discussion of the difference see extract of judgment from *M v. Secretary for Justice* [2007] HKDC 207 at the end of this submission.

is in our view an antiquated approach from a city which is a leading financial centre; its inclusion is welcomed.

3. Bearing in mind the historical, cultural, social and economic impact, e.g. the UK has had anti-discrimination laws for some time, and its population has become accustomed to the law through gradual development, it is relevant to consider whether the proposed change as envisaged in the Consultation Paper, in one go, would be too radical, particularly as Hong Kong has historically had a light touch approach to legislation with wide socio-economic implications.

CHAPTER 1: RATIONALE AND PRINCIPLES OF THE REVIEW

Consultation Question 1 P.26

Do you think that, in reforming the current discrimination laws, the Government should consolidate all the existing Discrimination Ordinances into a single modernized Discrimination Ordinance?

4. One view is that a single, consolidated and modernized Discrimination Ordinance would enable the public to understand the legal regime more easily. The same approach was adopted in the Securities and Futures Ordinance.
5. Another view offered is that before considering the issue further, it seems that the EOC might wish to revisit the issue again to identify the mischief the proposal aims to address, given that there could be benefits of having the four separate ordinances.

CHAPTER 2: GOALS OF THE LEGISLATION AND PROTECTED CHARACTERISTICS

Consultation Question 2 P.29

Do you think that a clause at the commencement of the discrimination legislation should be incorporated to set out its purpose or goals?

6. Different specialist committees of the Law Society have different views: some consider that this could assist all the stakeholders that need to understand the legislation, as well as assist courts in interpreting and applying the legislation in particular cases. This same approach was adopted in Australia.
7. Others are not in favour: when a UK consultation exercise considered similar proposal, they came out against incorporation of the clause. A purpose clause can undermine and distract. If this was thought to be helpful, why was it not included in the existing Discrimination Ordinances?

Consultation Question 3 P.30

Do you think that in relation to the protected characteristic of sex, neutral language of “a person” should be used?

8. One view is that gender neutral language should be used for all the sex discrimination provisions and that such approach would make it easier for people to immediately recognize that protection from sex discrimination and sexual harassment applies both to women and men.
9. Another view poses the question as to what mischief the proposal aims to address and/or whether there could be sufficient evidence to assert that the current arrangement is not working and thus justify the proposal?

Consultation Question 4 P.32

Do you think there should be express reference to protection from discrimination during maternity leave?

10. One view is that consideration should be given to offering protection during the period from when the pregnancy becomes known i.e. before the maternity leave commences. Another view poses the same question as in para 9 above,

i.e. what mischief the proposal aims to address, and whether there could be sufficient evidence to assert that the current arrangement is not working and thus justify the proposal?

Consultation Question 5 P.32

Do you think there should be protection from discrimination on grounds of potential pregnancy?

11. One view is that this is in line with the existing protection in cases of perceived pregnancy (and imputed sickness); pregnancy is one of the more common grounds of discrimination experienced in practice in workplaces in Hong Kong, and should be seriously looked into. Another view poses the same question as in para 9.

Consultation Question 6 P.37

Do you think that the protected characteristic of marital status should be amended to apply to “relationship status” and expressly protect persons in de facto relationships? If so, how should de facto relationships be defined? Should it be defined to include protection for both heterosexual relationships and same-sex relationships? Should this also be extended to protection from discrimination relating to former de facto relationships?

(a) Definition

12. De facto relationships could be defined by taking into account circumstances such as those set out in paragraph 2.26 of the Consultation Paper (with reference to the Australian legislation), i.e.
- (a) the duration of the relationship;
 - (b) the nature and extent of the common residence of the parties;
 - (c) whether a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support between them;
 - (e) the ownership, use and acquisition of their property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) the care and support of children; or
 - (h) the reputation and public aspects of the relationship.

13. A similar approach can also be found in section 3B(2) of the Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189), in which the Court can have regard to the following circumstances in determining whether two persons are in a “cohabitation relationship”:
 - (a) whether the parties are living together in the same household;
 - (b) whether the parties share the tasks and duties of their daily lives;
 - (c) whether there is stability and permanence in the relationship;
 - (d) the arrangement of sharing of expenses or financial support, and the degree of financial dependence or interdependence, between the parties;
 - (e) whether there is a sexual relationship between the parties;
 - (f) whether the parties share the care and support of a specified minor;
 - (g) the parties’ reasons for living together, and the degree of mutual commitment to a shared life;
 - (h) whether the parties conduct themselves towards friends, relatives or other persons as parties to a cohabitation relationship, and whether the parties are so treated by their friends and relatives or other persons.
14. Alternatively, de facto relationships could be defined by the institution of a system of registration of the relationship. Registration could be apt in assisting unable (as in cases where a party to the relationship is suffering from mental incapacity) or unwilling (as in cases where the relationship of the couple has soured) couples to seek remedy following the breakdown of their relationship.
15. If a registration system is to be set up for de facto relationships, the EOC would need to consider how the registration system operates in particular in cases when a party to the de facto relationship does not agree to acknowledge the relationship. For example, if a one party wants the other party to register their relationship, he can invite the other to attend at the relevant authority for such purpose (and issue a letter similar to a letter before action) and if the other party fails to respond, then application can be issued. Or should the court be involved? This and similar issues on the mechanism of registration would have to be further explored.

(b) *Protection extended to de facto relationships*

16. This could be a matter of policy. Without expressing comments on the desirability of the policy, if any, the Law Society wishes to draw the attention of EOC to the following.

17. Recognition of de facto relationships in discrimination law of Hong Kong could bring in new concepts and changes to various aspects of law, e.g. family law and employment law. There could be potential repercussions, for example, to employment, where for avoidance of discrimination, employers would need to budget for provision of employment benefits to also parties engaged in de facto relationships.
18. If de facto relationships are to be recognized, then how about *former* de facto relationships?
19. Apart from employment-related issues, recognition of de facto relationships could also bring in debates and arguments on access to health care, housing, and also legal issues such as consent to medical treatment.
20. The Law Society queries whether, by this discrimination law review, the EOC intends to elevate the legal status of cohabitants and same sex partners to married spouses. This must be approached very carefully; questions such as whether de facto relationships should include same sex couples and whether same-sex couples should receive the same treatment as heterosexual couples should be subject to a thorough and independent review. The related inter-departmental study commissioned in the aftermath of the CFA decision in the case of *W* (FACV 4/2012) has not yet released its report on issues related to gender recognition. We note that, on the other hand, the EOC has launched another study, viz. "*Feasibility Study on Legislating Against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex (LGBTI) Status*" earlier this year to look into the possibility of enhancing legal protections for the LGBTI community. The EOC has not yet released its findings. Given the above outstanding reviews and results to be issued, we question whether Hong Kong is now prepared or ready to legislate on arrangements and treatments for those in de facto relationships.
21. In considering the introduction of the concept of de facto relationships into Hong Kong, the EOC should not lose sight of the fact that, under the proposal, only benefits but not obligations are to be conferred upon the parties in a de facto relationship. The above should be contrasted with the positions in a formal marriage, where BOTH rights AND responsibilities are expected and conferred.
22. The Law Society notes the following international covenants which lay down the rights and obligations imposed on a married couple:

(a) Universal Declaration of Human Right

Article 16

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

(b) International Covenant on Economic, Social and Cultural Rights

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

(c) International Covenant on Civil and Political Rights

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

(d) Hong Kong Bill of Rights Ordinance

Article 19

- (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- (2) The right of men and women of marriageable age to marry and to found a family shall be recognized.
- (3) No marriage shall be entered into without the free and full consent of the intending spouses.
- (4) Spouses shall have equal rights and responsibilities as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

23. Leaving aside the consideration of gender in a relationship, it can readily be seen that only married couples are included in the above covenants. When parties in a marriage are subject to a series of heavy duties and responsibilities, but not the parties in a de facto relationship, the legitimate concern is whether parties in a marriage would be discriminated against under the EOC's proposals. This reverse discrimination would be undesirable and unacceptable.

Consultation Question 7 P.40

Do you think that the current definition and scope of what constitutes a disability is appropriate and proportionate? Or should it be amended in any way, for example by qualifying that the physical or mental impairment must be substantial and/ or likely to last a certain period?

24. The Law Society takes the view that this definition should be altered. The current definition is disproportionate and inept as it means that e.g. a one off headache is a disability. The definition should follow that used in UK. The UK definition embraces the concepts of both "substantial" and "long term". Both concepts should be recognized.
25. Further, a broad definition of disability to include both physical and mental disabilities, as well as disabilities that presently exist, previously existed, may exist in the future or are imputed to a person, would give a higher level of protection to the public.

Consultation Question 8 P.43

Do you think that the protected characteristic of family status should be redefined as “family responsibilities” in order to clarify that it relates to persons who have responsibility for the care of immediate family members?

26. Yes, this is a clearer definition.

Consultation Question 9 P.44

Do you think that the scope of family status discrimination should be expanded to include protection where persons in de facto relationships care for immediate family members? If so, how should de facto relationships be defined? Further, do you think the protection should be extended to situations where a person cares for an immediate family member from a former marriage or de facto relationship?

27. See the response to Question 8 above.

28. As for the definition of de facto relationship, see the responses in Question 6 above.

29. In respect of the proposed extension of the protection to former marriages, the Law Society suggests that that relates more to a moral obligation; the question does not fall within the legal compass for consideration or determination.

Consultation Question 10 P.44

Do you think that there should be express reference in the definition of family status to include breastfeeding women?

30. Yes. If in principle, Hong Kong society wishes to protect women from such discrimination, then express reference is needed. Apart from legislation, education should also be considered in protection against discrimination against breastfeeding women.

31. On the other hand, we consider that breastfeeding is only one of the many issues which flow from pregnancy / female employee giving birth; there are other kindred issues which should be considered at the same time: such issues could include the provision of a suitable venue for breastfeeding

employees in her workplace, arrangement for intervals for breastfeeding in the course of work, child care arrangement and paternity leave.

Consultation Question 11 P.50

In relation to the protected characteristic of race, do you think that any or all of the characteristics of nationality, citizenship, residency or related status should be added as protected characteristics?

32. The Law Society considers that this is a matter of policy. From an employment law perspective, it seems undesirable to include residency as protected characteristics.

Consultation Question 12 P.50

In relation to residency status or related status, if you think there should be protection, how should it be defined?

33. See the response to Question 11 above .
34. Without commenting on the desirability or otherwise of the proposed policy, the Law Society notes the concern arising out from the recent unfortunate saga of labeling recent arrivals and tourists from Mainland China, and suggest the Government to consider “place of origin” or similar parameters, instead of residency status.
35. Reference could also be made to other common law jurisdictions like Australia, the UK and New Zealand.

Consultation Question 13 P.51

Do you think that the exception to race discrimination on the grounds of permanent residency and right of abode in Hong Kong under section 8(3)(b)(i) and (ii) should be repealed?

36. See the responses to Questions 11 and 12 above.
37. Example 9 given by EOC in the Consultation Document (p.49 – estate agent refuses to provide service to new mainland immigrant) is misleading.

Hostility to mainlanders appears to derive from nationality or race but not permanent residency.

38. The EOC should note the provisions in Article 26 of the International Covenant on Civil and Political Rights and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. The provisions prohibit discrimination on the grounds of ‘national or social origin’ or ‘birth or other status’. As such, the discrimination suffered by the new arrivals from the Mainland should be addressed by the Government under the terms of the Covenants. Making any exception under these two grounds under section 8(3)(b)(i) and (ii) may be in contravention of the Covenants.

Consultation Question 14 P.51

Do you think that the exception to race discrimination on the grounds of length of residence in Hong Kong under section 8(3)(c) should be repealed?

39. See the response to Question 13 above.

Consultation Question 15 P.51

Do you think that the exception to race discrimination on the grounds of nationality, citizenship or resident status of a person in another country under section 8(3)(d) should be repealed?

40. See the response to Question 13 above.

Consultation Question 16 P.51

Do you think that consideration should be given to an exception to discrimination on grounds of residency status, but only where the relevant requirement is for a legitimate aim and is proportionate?

41. The EOC is invited to consider
- (a) the approach adopted by the Court of Final Appeal in *Kong Yunming v The Director of Social Welfare* FACV 2/2013 ;
 - (b) whether uncertainty could arise if “legitimate aim” and “proportionality” are to be brought to the consideration.

CHAPTER 3: FORMS OF PROHIBITED CONDUCT

Consultation Question 17 P.57

Do you think that the definition of direct discrimination should be amended to:

- include any less favourable treatment on grounds of a protected characteristic; and
- made clear that for direct disability discrimination a comparison can be made with persons without that particular disability (including persons with a different disability)?

(a) *“any less favourable treatment on grounds of a protected characteristic”*,

42. In paragraph 3.13 of the Consultation Paper, the EOC says that “One problem with the current model of direct discrimination is that all the Discrimination Ordinances refer to discrimination on grounds of the particular characteristic of *the person*”. It is unclear whether there is a practical problem with the existing legislation in practice. That is, what is the “mischief”, by reference to actual problems encountered, are being sought to be addressed with the proposed change?
43. The EOC’s proposal to amend the formulation of direct discrimination for all the protected characteristics to state “...on the grounds of the protected characteristic” will significantly but unnecessarily extend the existing scope of direct discrimination.
44. In example 11 of the Consultation Paper (p.55 – Chinese manager dismissed because he did not agree to exclude Nepalese people from entry to game centre), the treatment of the Chinese manager is *not* on the grounds of the manager’s race and so is not an unlawful discrimination issue. The termination of the manager’s employment is more an employment issue than an unlawful discrimination issue.
45. Further, arguably, the employer would have breached s.43 of the RDO.
46. The Law Society asks that any expansion of the existing legislation should be approached carefully and be considered in the context of whether there is an actual problem with the existing legislation in practice.

(b) *“for direct disability discrimination, a comparison can be made either with persons without that particular disability, or without any”*,

47. The present situation of looking for a comparator “without a disability” is clearer and possibly easier to apply than comparing against another in the same or not materially different circumstances which could include a person with a disability but not the complainant’s particular disability.
48. The Law Society does not see any convincing justification of departing from this practice. We take note that under the existing law, an employer is not required to investigate the disability of an employee, or to assess such disability.
49. In *M v. Secretary for Justice* [2009] 2 HKLRD 298, neither the complainant nor the employer was aware of the complaint’s disability at the time. The Court of Appeal held that it was not necessary for the complainant to demonstrate that his employer had actual or constructive knowledge that his disturbed behaviour was the result of a disability. The employers’ knowledge of the complainant’s disturbed behaviour, which was a manifestation of his disability, was sufficient.
50. When choosing a comparator, the employers should not therefore be saddled with the duties to apprise themselves of the disability of a comparator.
51. In disability discrimination cases, there has not been any assumption that an employer is obliged to inquire or confirm whether an employee has a particular kind of disability.
52. On the other hand, if there is freedom to choose a comparator with a different disability, it could invite disagreement and arguments on who the comparator should be. See for example *Yeung Chun Wai v. St. Paul’s Hospital* DCEO 7/2003, where both parties proposed different comparators. The Court has also said where the identity of the comparator is in dispute, seeking to identify the appropriate comparator may cause unnecessary complications, and it may be more appropriate to focus on the cause of the conduct (*Sit Ka Yin Priscilla v. Equal Opportunities Commission* DCEO 11/1999, approving the approach of the House of Lords in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).
53. The Law Society repeats that a comparison with a person without a disability is clear and certain. It is easier to understand than trying to work out the treatment of a person with a different disability.

Consultation Question 18 P.59

Do you think that there should be a different test for direct pregnancy discrimination which states:

“on the ground of her pregnancy, sickness or other characteristic that appertains generally to women who are pregnant or potentially pregnant a person treats her unfavourably ”?

54. The Consultation Paper raises two issues, namely, (a) removing the requirement of a comparator, and (b) incorporating into the definition aspects that arise from the pregnancy such as sickness, or when the female staff is dismissed after returning from maternity leave.

(a) removing the requirement of a comparator

55. The “comparator test” is a concept understood in Hong Kong. The EOC has not raised any arguments to suggest that this concept is not working for pregnancy discrimination in Hong Kong.

56. Adopting an “unfavourable” treatment test would without justification lower the bar for the test for pregnancy discrimination.

57. A distinction could be drawn between the EOC’s proposed approach and the UK approach in the Equality Act 2010. Under the Equality Act 2010 the protection for unfavourable treatment is limited to the “protected period”, whereas in Hong Kong currently or as proposed, there is no such “protected period”.

58. The Law Society does not agree to the proposal.

(b) incorporating into the definition aspects that arise from the pregnancy such as sickness, or when the female staff is dismissed after returning from maternity leave

59. Section 15 and 33(4B) of the Employment Ordinance, Cap 57 (“EO”) already provides employment protection to an employee who is pregnant or sick². So, in the example given at paragraph 3.27 of the Consultation Paper (p.58 – sick leave taken by pregnant women), there would already be

² See also ss.33(3A), (3B) and (3C) of the EO

employment protection for an employee who is dismissed while on sick leave and/or pregnant.

60. As to the comments in paragraph 3.28 of the Consultation Paper (p.58), an employee who has returned from maternity leave who has been treated less favourably after her return on the grounds of her being pregnant (and having to take maternity leave) would be, it is submitted, protected under the current provisions of the SDO. Among other things, an employer would need to overcome the hurdle of the deeming section in s.4 of the SDO.
61. Similarly, s.4 of the SDO would apply in respect of the issues raised in paragraph 3.29 of the Consultation Paper (p.58).
62. As such, the Law Society does not agree to the proposal.

Consultation Question 19 P.59

How to protect pregnant staff from dismissal after maternity leave on the pretext that the temporary replacement performed better?

63. Pregnant employees currently receive protection from less favourable treatment on the grounds of pregnancy. This would include following the return from maternity leave. If it can be shown that dismissal is only under the “pretext” (i.e. not the real reason) of the temporary replacement performs better and a part of the reason is due to the pregnancy of the employee, then this would be caught under the existing legislation.

Consultation Question 20 P.62

Do you think that the definition of indirect discrimination should be amended to:

- refer to a “provision, requirement or practice”; and
- set out the meaning of “justifiable” as where a provision, requirement or practice “serves a legitimate objective and bears a rational and proportionate connection to the objective”?

(a) refer to a “provision, requirement or practice”

64. The proposal will broaden the scope of coverage for indirect discrimination. The Law Society asks for justification for the broadening of the scope. Where

is the particular mischief and problem in practice where the existing provisions are not working?

(b) *set out the meaning of “justifiable” as where a provision, requirement or practice “serves a legitimate objective and bears a rational and proportionate connection to the objective”*

65. The case of *Maria College*³ already provides some case law guidance on what to consider in the context of justification. While it is a “nice to have” if the legislation is being amended in any event to cover other required changes, it is perhaps unnecessary at this time to introduce legislation solely to address this amendment.

Consultation Question 21 P.66

Do you think that there is a need for introducing specific equal pay for equal value provisions?

66. It is difficult to comment on whether there is a need to introduce specific equal pay for equal value provisions or legislation without more information on the precise nature of the “mischief” for Hong Kong to be remedied, what options are available for addressing the mischief and understanding the likely impact. Further analysis is called for, but in any event, this is more an issue of Government policy.

Consultation Question 22 P.67

Do you think that discrimination due to being accompanied by assistance animal should be added as a category of disability discrimination?

67. This is a question of policy for the Government.

Consultation Question 23 P.70

Do you think that a new category of discrimination arising from disability should be introduced?

³ *Siu Kai Yuen v. Maria College* [2005] HKDC 55

68. The Law Society has not yet seen any data or research from the EOC indicating an actual issue in Hong Kong (which the current legislation cannot deal with) requiring the proposed legislative intervention.
69. As to paragraph 3.64 of the Consultation Paper (p.68), it may well be proved that the proportion of persons with a disability who can comply with the condition to not take more than 3 weeks unpaid leave is considerably smaller than the proportion of persons without a disability. The issue will then turn on justification of that condition or requirement.
70. As to paragraph 3.66 of the Consultation Paper (p.68), s.3 of the DDO provides that if (a) an act is done for 2 or more reasons; and (b) one of the reasons is the disability of a person (whether or not it is the dominant or a substantial reason for doing the act), then, for the purposes of the DDO, the act is taken to be done for the reason specified in (b). While this does not expressly deal with discrimination arising from disability, it does cover it to a degree.
71. Unless there is more plausible justification, the Law Society at this stage does not agree to the proposal.

Consultation Question 24 P.73

Do you think that new distinct duty to make reasonable accommodation for persons with disabilities should be introduced in the discrimination legislation and that it should be based on the United Kingdom model?

72. The EOC's proposal is to impose an obligation to make reasonable accommodation, even where there is no less favourable treatment. This would be a fundamental shift from the current approach (of ensuring no anti-discrimination to imposing a positive duty to promote equality⁴) and is, it is submitted, a Government policy issue.
73. The DDO does not currently impose this obligation. Provision of reasonable accommodation is only relevant and applicable if an employer elects to invoke it as a defence to unlawful disability discrimination.
74. For employers there will be additional compliance costs.

⁴ For a discussion of the difference see extract of judgment from *M v. Secretary for Justice* at the end of this submission

Consultation Question 25 P.76

Do you think that harassment should be prohibited in relation to the protected characteristics of sex, pregnancy, family status and marital status?

75. The Law Society has not seen any evidence that harassment on any of the listed protected characteristics is a recurring issue in Hong Kong. The anti-harassment policies of employers we have seen do not in the main cover any of these protected characteristics.
76. We suggest that the EOC might wish to consider the question also in the context of anti-stalking legislation the legislative process of which we understand has been put on hold.

Consultation Question 26 P.78

Do you think that the definition for harassment for all protected characteristics should be “A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and**
- (b) the conduct has the purpose or effect of—**
 - (i) violating B’s dignity, or**
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B”?**

77. Is there any indication that the current legislative framework is not working?
78. The proposed language expands the concept of harassment and possibly opens up more areas for dispute. For example, how is it proposed to prove that conduct has the “effect of violating B’s dignity”, which will inevitably involve an element of subjective assessment? Currently under the SDO and DDO, the test for hostile work environment harassment requires that a reasonable person “would have anticipated that [the complainant] would be offended, humiliated or intimidated”.
79. It is unclear whether when considering whether the “conduct has the purpose” of the matters in (i) or (ii) of the proposed language, this should be an objective or subjective assessment. The EOC should clarify whether

under its proposal, the objective test as stipulated in section 26(4) of the Equality Act⁵ will be included.

80. The Law Society does not agree to this proposal.

Consultation Question 27 P.79

Do you think there should be protection from harassment for all protected characteristics?

81. See the response to question 25 above.

Consultation Question 28 P.79

In relation to sexual harassment, do you think that the definition should be the same as other forms of harassment, other than stating in addition that it is unwanted conduct of a sexual nature?

82. The formulation in the current legislation works.

Consultation Question 29 P.81

Do you think that there should be provisions on intersectional direct and indirect discrimination, as well as harassment? If so, do you think that there should be protection from intersectional discrimination on the basis of two or more protected characteristics?

83. It is unclear from the Consultation Paper that intersectional discrimination is an actual issue in Hong Kong.

84. As to Example 21 (p.81 – bank manager refuses a foreign domestic worker to open a bank account), assuming that the bank has made a genuine commercial assessment of its risks and decision to manage its risk in the manner set out in the example, it would appear that the EOC is suggesting that it should be unlawful for a bank to make a business decision; in essence

⁵ In deciding whether conduct has the effect, each of the following must be taken into account:

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.
(referred to in the Consultation Paper in para 3.96)

outlawing business efficacy. It may be that government intervention is required to assist foreign domestic helps open a bank account (if this is indeed a problem), however, it is not the place of discrimination law to do so by extending concepts of unlawful discrimination.

85. In considering the above and the issue raised in paragraph 3.102 of the Consultation Paper (p.79), the Law Society has noted the deeming provisions each of the anti-discrimination Ordinances now contain ⁶.
86. The Law Society does not agree to the proposal.

Consultation Question 30 P.84

Do you think that:

- **there should be protection from direct and indirect discrimination, and harassment by association across all the protected characteristics;**
- **and if so, do you think “association” should be broadly defined to include association by immediate family, other relatives, caring responsibilities, friendships or working relationships?**

87. Introducing legislation to cover discrimination and harassment by association across all protected characteristics will be a huge broadening of those concepts. The Law Society is not aware of how much discrimination by association (other than for disability) happens in practice (e.g., the proposal will only have a theoretical impact if it is not a problem in practice); we have not heard of any cases.
88. The Law Society has not heard of a situation even close to that in Example 25 (p.84 – direct pregnancy discrimination against male employees, by association). If the male employee was wrongfully terminated for assisting a female colleague, then he may have a remedy under employment law. The EOC is suggesting the male employee should be able to bring a pregnancy discrimination claim when he is incapable of being pregnant; this twists the concept of discrimination as commonly understood.
89. It would be extraordinary to hear that an employer would actually terminate the employment of an employee for the reason suggested (even if it could form part of the reason). However, expanding the concept of discrimination to cover association would allow an (unscrupulous) employee to allege unlawful discrimination. By virtue of the deeming sections in the anti-discrimination Ordinances, this would essentially shift the burden onto the

⁶ For example, s.3 DDO and s.9 RDO

employer to prove it is not the case. This would open up avenues for possible attack on employers.

90. It is unclear what type of actual circumstances “indirect discrimination” of an associate will catch. On this basis it is difficult to consider how broadly “association” should be defined, if at all.
91. The Law Society does not agree to the proposal.

Consultation Question 31 P.85

Do you think that there should be express protection from direct and indirect discrimination, and harassment by perception and imputation across all the existing protected characteristics?

92. In Example 26 (p.85 – woman denied interview because she adopts the surname of her husband who is a Muslim), the woman may have a claim under s.5 of the RDO⁷.
93. As to Example 27 (p.85 – worker dismissed because her father had an accident and the employer considered that the worker needed to take leave to take care of her father), again, this is possibly already covered under the FSDO if the woman is treated less favourable on the ground of the care for an immediate family member. The definition of “family status” means “the status of having responsibility for the care of an immediate family member” and does not require actual care of that family member in order to trigger the protection under the FSDO.
94. The Law Society does not agree to the proposal.

Consultation Question 32 P.87

Do you think that there should be a defence for principals to liability from unlawful conduct of agents, where the principal took reasonably practicable steps to prevent the unlawful conduct?

⁷ Section 5 RDO provides: “In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the discriminator”) discriminates against another person (“relevant person”) if, on the ground of the race of a near relative of the relevant person, the discriminator treats the relevant person less favourably than the discriminator treats or would treat another person not having a near relative of the same racial group as the near relative of the relevant person.”

95. Yes.

Consultation Question 33 P.88

Do you think that the prohibition on requesting information for a discriminatory purpose relating to disability discrimination should be extended to all existing protected characteristics?

96. Yes.

CHAPTER 4: FIELDS OF PROHIBITED CONDUCT

General Remarks

97. The Law Society repeats its observations made in Chapter 3 above.

Consultation Question 34 P.91

Do you think that there should be express provisions in the discrimination laws that it applies to all public authorities, and that it is unlawful for them to discriminate in the performance of their functions and exercise of their powers?

98. This is a matter of policy.

Consultation Question 35 P.93

Do you think that there should be protection from racial discrimination in the exercise of the Government's functions and powers?

99. This is a matter of policy.

100. Without commenting on the desirability of the policy, the Law Society asks the Government to note that racial equality does not mean that every person shall be entitled to same social welfare. The Government should consider fairness of policies on access to public funds. For example, in Canada, the Government has recently implemented policy on requiring those students, who were born in Canada but both parents are from the PRC, to pay higher tuition fees and are not entitled to free education in Canada as those of local citizens.

Consultation Question 36 P.94

Do you think that for reasons of consistency there should be an express prohibition on disability discrimination in relation to election and voting of members to public bodies? If so, do you think that there should be an exception permitting disability discrimination but only where it is for a legitimate aim and proportionate?

101. This is a matter of policy.

Consultation Question 37 P.96

Do you think that the current express protection from disability discrimination in sporting activity should be extended to all the protected characteristics?

102. This is a matter of policy.

Consultation Question 38 P.98

Do you think that the limitations on the operation of the RDO in the education and vocational training sectors regarding the exception on the medium of instruction should be repealed?

103. This is a matter of policy.

104. Without commenting on the desirability of the policy, the Law Society asks the Government to note that under Basic Laws, English and Chinese are the official languages and provision of both languages is sufficient.

Consultation Question 39 P.108

Do you think that new harassment provisions should be introduced for all the protected characteristics which provide:

- (1) employer liability for harassment of employees by customers, tenants or any other third parties not in an employment relationship where an employer is put on notice of the harassment and fails to take reasonable action;**
- (2) common workplace liability on the person harassing but there is no employer/ employee relationship (e.g. volunteers harassed by another volunteer);**
- (3) liability on educational establishments where they are put on notice of harassment between students and fail to take reasonable action;**
- (4) liability of service users for harassing the service providers;**
- (5) liability of service users for harassing other service users;**
- (6) liability for harassment on ships and aircraft in relation to the provision of goods, facilities and services;**
- (7) liability of tenants and subtenants for harassing other tenants or**

- subtenants; and
- (8) liability of the management of clubs for harassing members or prospective members?**

105. Yes to (6) above. As for the rest, these are matters of policy.

CHAPTER 5: PROMOTING AND MAINSTREAMING EQUALITY

Consultation Question 40 P.115

Do you think that:

- Special measures provisions should be conceptualized and positioned within the discrimination legislation as measures to promote substantive equality rather than exceptions to non-discrimination; and
- The definition of special measures should be made clearer as suggested in paragraph 5.18 in terms of their purpose, circumstances in which they can be used and when they should end?

106. The Law Society takes the view that

- (a) generally special measures should be positioned within the discrimination legislation as measures to promote substantive equity rather than exceptions to non-discrimination;
- (b) a clear definition of special measures is helpful;
- (c) reference could be made to the draft Human Rights and Anti-Discrimination Bill 2012 in Australia.

107. On the other hand, while it is difficult to challenge a highly generalized proposal for re-positioning “special measures” and defining it, the proposed definition in paragraph 5.18 may need further consideration.

108. The Law Society shall ask the EOC to take note of and to consider the above.

Consultation Question 41 P.122

Do you think that there should be duties on all public authorities to promote equality and eliminate discrimination in all their functions and policies, and across all protected characteristics?

109. The Law Society considers that

- (a) public authorities should take a leading role in promoting equity;
- (b) although an individual cannot seek to enforce the duty, EOC can use information about compliance with the duty for the purposes of an investigation into a public body.

110. Yet, without a Human Rights Commission, the Law Society questions whether the power for such investigation should be vested with EOC.

CHAPTER 6: ASPECTS OF COURT PROCEEDINGS, POWERS AND CONSTITUTION OF THE EOC

Consultation Question 42 P.126

Do you think there should be provisions introduced which indicate that once the claimant establishes facts from which discrimination can be inferred, the burden of proof shifts to the respondent to show there was no discrimination?

111. The Law Society does not agree to this proposal.
112. The burden of proof should rest with the plaintiffs as in all other civil claims. The plaintiff is required to establish the relevant primary facts on the balance of probabilities. The court then draws appropriate inferences and consider and weigh explanation (if any) given by the defendant.⁸ If no explanation is put forward by the defendant, or if the court considers the explanation to be inadequate or unsatisfactory, it will be *legitimate* for the court to infer that the discrimination was on the alleged prohibited ground, but it will not be obliged to do so⁹. Shifting of the evidential burden would unhelpfully and unnecessarily disturb the conventional norms about the burden of proof.

Consultation Question 43 P.127

Do you think that, consistent with indirect disability discrimination provisions, damages should be able to be awarded for indirect sex, pregnancy, marital status, family status and race discrimination, even where there was no intention to discriminate?

113. The Law Society notes the inconsistency within the ordinances: for DDO, intention is irrelevant; but for SDO, FSDO and RDO, intention is relevant. The Law Society asks whether the “inconsistency” is accidental or intentional.
114. There are two views on this issue. One view is that the consistency should be provided for; it is noted that similar inconsistency has been removed in the UK and Australia.

⁸ *Yeung Chung Wai v. St Paul's Hospital*, DCEO 7/2003, paragraph 31

⁹ *Lam Wing Lai v YT Cheng (Chingtai) Ltd* [2006] 1 HKLRD 639; *Chan Choi Yin Janice v Toppan Forms (HK) Ltd* [2006] 3 HKC 143; *Aquino Celestina Valdez v So Mei Ngoh Betty* (DCE03/2004)

115. When damages are not available, victims of indirect discrimination have little or no incentives to bring an action knowing that no damages will be awarded if intention cannot be established.
116. Provision of damages should not open a floodgate of litigation. Not only is indirect discrimination not entirely obvious to the victims, it is also not easy to prove.¹⁰
117. Another view is that caution should be exercised on removing the requirement of intention, as indirect discrimination may not be always obvious to employers and on occasions could be accidental.

Consultation Question 44 P.129

Do you think that the discrimination laws should be amended to ensure the EOC can recover its legal costs where claimants are awarded costs?

118. There are two views on this question.
119. The general rule on costs in discrimination litigation is that each party bears its own costs. Costs will be awarded only if the proceedings are malicious or frivolous or there are special circumstances (District Court Ordinance, s.73B(3)).
120. Furthermore, if a claimant is awarded costs and expenses, EOC can recover only the expenses (e.g. fee for preparing expert evidence) by way of first charge on the claimant (that is similar to the power of the Legal Aid Department), but not the profit costs of solicitors.
121. One view is that, as a matter of fairness, there is no justification why costs incurred by the EOC could not be recouped; EOC should be entitled to recover costs subject to taxation.
122. The other view is that the reasoning offered by the EOC is not convincing and there is no need to change the present position.

¹⁰ See *Carole J. Petersen* (2007) Hong Kong's Race Discrimination Bill A Critique and Comparison with The Sex Discrimination and Disability Discrimination Ordinances, at <https://www.law.hku.hk/ccpl/Docs/CarolePetersen-rev19June.pdf>

Consultation Question 45 P.130

Do you think that for reasons of consistency with its other powers, the EOC should be able to initiate proceedings in its own name for discriminatory practices?

123. This is a policy issue. Without commenting on the merits of the pros and cons of this proposal, the Law Society notes that the EOC could initiate “formal investigation” and can issue enforcement notices. So far only two “formal investigations” have been conducted and published¹¹. There is no evidence to suggest that lack of the power to initiate proceedings has prevented EOC from enforcing its notices. In all the past cases EOC encountered no difficulty in enforcement.

124. The Law Society also questions whether in dealing with discriminatory practices, it is necessary for EOC to seek the same power as it has in, say, handling discriminatory advertisements¹².

Consultation Question 46 P.132

Do you think that the discrimination laws should contain an express power that the EOC may produce non-statutory guidance?

125. In each of the Discrimination Ordinances, the EOC is empowered to “*do all such things as are necessary for, or incidental or conducive to, the better performance of its functions*”, which aim to work towards elimination of discrimination and promoting equality of opportunity. The Law Society therefore anticipates that, under the existing framework, the EOC’s power to issue non-statutory guidelines is implicitly provided for. For the sake of removing doubts, the Law Society considers that such power should be

¹¹ <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/investigation/default.aspx>

¹² *Equal Opportunities Commission v Apple Daily Ltd* [1999] 1 HKLRD 188, Court of Appeal. The trial judge held that the advertisement did not contravene the SDO on the basis that it was capable of bearing two different meanings, one of which did not contravene the SDO. The Court of Appeal overturned the decision, holding that once it was established that an advertisement indicated, or might reasonably be understood as indicating an intention by a person to any act which was or might be unlawful, there was a contravention of s 43 of the SDO. It did not matter that the advertisement also indicated, or might reasonably be understood as indicating some other intention to do an act which was not unlawful. If the mere existence of an alternative meaning was to be taken to an indication of a contrary meaning so as to preclude compliance with the criteria in s 43(1) of the SDO, that would severely limit it. However, if the innocuous meaning, emerged so powerfully or understood so comprehensively as to displace or preclude that conveying the unlawful intention, a finding that the advertisement could reasonably understood in an unlawful way must be open to doubt.

explicitly and clearly set out, on the condition that the non-statutory status of the codes/guidelines remains undisturbed.

Consultation Question 47 P.135

Do you think that the formal investigation provisions should set out more clearly the distinction between general and specific investigations?

126. All the discrimination ordinances provide that the EOC “*may, if it thinks fit, and shall if required by the Chief Secretary for Administration, conduct a formal investigation for any purpose connected with the carrying out of any of its [statutory] functions ...*”¹³ The EOC must draw up terms of reference for the formal investigation¹⁴ and general notice of the formal investigation must also be given unless the terms of reference confine it to activities of persons named in them, in which case the EOC should give those persons notice in the prescribed manner.¹⁵ In the latter case if in the course of investigation, the EOC proposes to investigate any unlawful act which it believes that a person so named may have done, the EOC must also observe the prescribed procedure (e.g. informing that person of its belief and of its proposal to investigate the act, offering him an opportunity of making representations etc.).¹⁶

127. The delineation between general and specific investigations is unclear. A potential problem with the current provisions is that in a general investigation where the terms of reference are not confined to the activities of persons named therein, the EOC need not follow the prescribed procedure even if in the course of the investigation it becomes aware that a particular person may have committed an unlawful act and the EOC desires to conduct further investigation. This may be unfair to the person being investigated as he is not given the notice that he would have an entirely specific investigation.

128. In contrast, the UK Equality Act 2006 has a clearer procedural delineation between general and specific investigations¹⁷. Setting clearer boundaries

¹³ E.g. s.70, SDO.

¹⁴ E.g. s.71(2), SDO.

¹⁵ E.g. s.71(3), SDO.

¹⁶ E.g., s.71(4), SDO.

¹⁷ E.g. s.16, Equality Act 2006 UK: If in the course of an inquiry the Commission for Equality and Human Rights begins to suspect that a person may have committed an unlawful act, in continuing the inquiry the Commission should avoid further consideration of whether or not the person has committed an unlawful act. The Commission may then commence specific investigation into the matter but before doing so it must comply with the prescribed procedure such as giving that person notice and opportunity to make representations.

between general and specific investigations would be fairer to the person being investigated.

Consultation Question 48 P.136

Do you think that for reasons of consistency with the EOC's other powers, the EOC should be able to issue enforcement notices relating to discriminatory practices against persons with disabilities?

129. Section 41 of the DDO (discriminatory practices) provides that proceedings in respect of a contravention of that section can be brought only by the EOC in accordance with sections 73, 74, 75, 76 and 77, which relate to enforcement notices. However, section 73, which governs the issue of enforcement notices, does not apply to a contravention of section 41. There is no such anomaly in SDO, FSDO or RDO. The EOC is asked to clarify the apparent inconsistency in the legislation.

Consultation Question 49 P.136

Do you think that in relation to formal investigations provisions, permitting voluntary binding undertakings should be introduced and be enforceable by the EOC?

130. Currently, if in the course of a formal investigation, the EOC is satisfied that a person is committing or has committed an unlawful discriminatory act, it may serve an enforcement notice on him requiring him not to commit the act.¹⁸ In respect of certain unlawful acts (e.g. discriminatory advertisements), it may initiate legal proceedings in its own name.¹⁹ These enforcement actions usually take up a considerable amount of time and financial resources before the unlawful acts are finally remedied.

131. Voluntary and binding undertaking or agreement is a flexible alternative to enforcement notices and civil actions, in that the EOC and the other party may negotiate the terms of the agreements. They may also jointly formulate an action plan to eliminate the unlawful discriminatory acts. The arrangement may be found more acceptable to the suspected discriminator, thereby enhancing the likelihood of compliance.

¹⁸ E.g. s.77(2), SDO

¹⁹ E.g. s.82, SDO. *Equal Opportunities Commission v Apple Daily Ltd* [1999] 1 HKLRD 188, Court of Appeal.

132. Voluntary and binding undertakings or agreements may be entered into without commencing a formal investigation. Reference could be made to the UK Equality Act 2006 which provides that such an agreement may be entered into whether or not the person is or has been the subject of a specific investigation.²⁰ This is considered to be a more efficient enforcement tool in cases where the contravention is clear but not so serious. In these cases, it may be more appropriate for the EOC to address the issue by securing a voluntary and binding undertaking or agreement from the suspected discriminator.
133. Securing a voluntary and binding undertaking or agreement is a faster and more effective way to deal with suspected unlawful discriminatory acts.

Consultation Question 50 P.136

Do you think that the discrimination laws should expressly provide that the EOC has powers to conduct research and education in relation to all the protected characteristics?

134. Section 65(1) of the SDO provides the EOC “*may undertake or assist (financially or otherwise) the undertaking by other persons of any research, and any educational activities, which appear to the [EOC] necessary or expedient for the performance of its functions*”. There is no similar provision in FSDO, DDO or RDO. The reason for the omission appears to be that the power to conduct research and education in relation to other protected characteristics is already inclusive in the provision as the EOC’s functions include those provided for under other Discrimination Ordinances.²¹
135. While it is not strictly necessary for other discrimination ordinances to provide for the same, the Law Society suggests to explicitly provide for these power on research and education and to remove any inconsistency in the overall scheduling and planning by the EOC.

²⁰ S.23(4)(b), Equality Act 2006 UK

²¹ See Minutes of the 12th Meeting of the Bills Committee on the Equal Opportunities (Family Responsibility, Sexuality & Age) Bill, Equal Opportunities (Race) Bill, Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996 and Family Status Discrimination Bill held on Thursday, 5 June 1997 at 12:30 pm in the Chamber of the Legislative Council Building

Consultation Question 51 P.138

Do you think that reformed discrimination laws should expressly provide that the EOC has powers to monitor and advise:

- **The Government on relevant existing and proposed legislation and policy; and**
- **On the Government's compliance with international human rights obligations relating to equality and discrimination?**

136. The EOC is a statutory body entrusted with the responsibility of eliminating of discrimination. The mandate of the EOC is inter alia to eliminate discrimination on the ground of the protected characteristics. Note that all the discrimination ordinances provide that the EOC "*may do all such things as are necessary for, or incidental or conducive to, the better performance of its functions*"; these are aimed at existing protected characteristics. Arguably, the EOC has no mandate to monitor and advise on discrimination on other grounds, or equality generally.

137. As to whether the EOC should have its power, as suggested, this is essentially a matter of policy, which the Law Society would not comment upon. However, the Law Society could point out the following for the consideration by the EOC.

138. There should be clear policy objectives as to whether a Human Rights Commission should be set up to monitor and advise on legislation or international human rights obligations.

139. If the policy is to set up a Human Rights Commission, then in the interim period of time, the law should be made sufficiently clear in order that the EOC is adequately empowered to monitor and advise on legislation or international human rights obligations relating to any issue of equality, and not only discrimination on the ground of the protected characteristics.

140. The EOC should also consider whether the proposed expansion of EOC's powers could more likely prompt or otherwise hinder the establishment of the proposed Human Rights Commission.

Consultation Question 52 P.139

Do you think there should be an express power of the EOC to apply to intervene in or appear as amicus curiae in court proceedings relating to any relevant discrimination issue?

141. The EOC has already applied to courts and intervened or appeared as amicus curiae in a number of proceedings. The practice should continue.
142. However, it is noted that the EOC acted as an amicus curia in cases where the ground of the protected characteristics is outside the scope of the existing four Discrimination Ordinances²², albeit, so far, no issue of ultra vires has been raised.
143. For the avoidance of doubts, the Law Society suggests that this power should be expressly provided for in legislation, on the condition that the provision would not by itself extend the scope of practice currently enjoyed by the EOC.

Consultation Question 53 P.140

Do you think that the EOC's power to institute judicial review proceedings should be more clearly set out as a separate power of the EOC?

144. This is a matter of policy. While the Secretary for Constitutional and Mainland Affairs is empowered to make regulations empowering the EOC to bring certain proceedings (s. 89 SDO), it is accepted that that section is without prejudice to the EOC's power to bring proceedings by way of judicial review. However, such power of EOC to initiate judicial review may target a wider and more entrenched form of discrimination. The case of *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 shows that the impact of the judicial review can be far-reaching and controversial. There are continuing debates among the teaching professionals as to whether the result of the *Director of Education* (ibid) case is desirable or beneficial to local students individually or as a whole.

²² *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903, CFA, concerning criminal laws of buggery and their discriminatory impact on groups identified by sexual orientation

Consultation Question 54 P.141

Do you think that the EOC should be required to produce a Strategic Plan in consultation with the public that sets out its strategic priority areas of work over several years?

145. The Law Society agrees that the EOC should be required to produce a Strategic Plan in consultation with the public. A Strategic Plan could keep the EOC abreast of the needs, expectations and concerns of different sectors of society so that it could have a clearer direction when performing its functions. This will facilitate the formulation of a more proactive approach to combating discrimination and to advocating equality, instead of following the current passive approach on overtly favouring conciliation of discrimination complaints. This latter approach has only limited impact on the advancement of equality. Further, a Strategic Plan, together with a review mechanism, could ensure that the EOC could prioritize its work and be conscious of the progress, or lack thereof, thus focusing its efforts to achieve particular goal(s).

Consultation Question 55 P.144

Do you think that a provision should be included in reformed discrimination laws providing for the maintenance of the independence of the EOC from the Government?

146. The Law Society takes note of the following:

- the existing provisions in the SDO²³ on the independent status of the EOC.
- The case of *Equal Opportunities Commission v Director of Education* (ibid) on the independence of EOC.

147. The Law Society takes the view that independence of the EOC is important given the EOC's role as a watchdog which is entrusted with the responsibility of combating discrimination, including discriminatory acts by the Government. Without independence from the Government, it would be difficult for the EOC to impartially carry out its statutory duties when discrimination by the Government is alleged.

148. The fact that the Constitutional and Mainland Affairs Bureau is the EOC's housekeeping bureau and has influence over its finance does not help

²³ S.63(7), SDO

alleviate the concern over its lack of independence. Further and clearer provisions reinforcing the independent status of the EOC are warranted.

149. The Law Society also suggests that given the work nature of the EOC, the general perception on any lack of independence of EOC is important and asks that when this question is to be further considered, the EOC should take the general perception into consideration.

Consultation Question 56 P.144

Do you think that in relation to Board members, applications should be openly invited and an independent panel established to interview and make recommendations for appointments?

150. As an equality watchdog, it is imperative for the EOC to maintain independence from the Government. At the moment, its Chairperson and Board members are selected and appointed by the Chief Executive.
151. Although the appointment of the Chairperson is comparatively more transparent, appointments of other Board members are made in a process which lacks sufficient accountability. As the EOC makes its decisions by way of a majority of votes of its members²⁴, it is imperative that members of the EOC can discharge their duties independent of the influence of the Government. A more transparent, fairer and sufficiently independent appointment process could ensure that the EOC could fulfill its role.
152. The Law Society also repeats its above observation on the relevance of general perception.

Consultation Question 57 P.144

Do you think that there should be a provision in the legislation requiring Board members to have suitable experience in any relevant area of discrimination or promoting equality?

153. As Hong Kong's equality watchdog, the EOC is tasked with the important duty to combat discrimination and also promote equality; its decisions are pivotal in the development of discrimination law. The Law Society is concerned that members with no solid experience in equality-related work

²⁴ See paragraph 6 of Schedule 6 of the SDO.

might take into consideration irrelevant factors and thus deliver decisions which might not help in the above regards.

154. The Law Society agrees that there should be such a provision, as proposed.

Consultation Question 58 P.145

Do you think that there should be a provision protecting EOC members and staff from personal liability where they act in good faith in relation to the DDO and FSDO, as is the case for the SDO and RDO?

155. Currently, SDO and RDO protect EOC members and staff from personal liability where they act in good faith, but DDO or FSDO do not. There is no logical basis for the distinction.

Consultation Question 59 P.145

Do you think that there should be express provision restricting disclosure of information arising from complaint handling in accordance with the principles of confidentiality?

156. There are express provisions in the legislation relating to the complaint handling functions of other statutory bodies such as the Ombudsman and the Privacy Commissioner. There is no reason why the discrimination legislation should not follow these other provisions.

Consultation Question 60 P.147

Do you think that Hong Kong should establish a Human Rights Commission fully compliant with the Paris Principles? If so what structure and mandate should the Human Rights Commission have?

157. The EOC's mandate is to administer the Discrimination Ordinances. There is no single body in Hong Kong responsible for promoting and monitoring wider human rights.

158. Back in 2005, the Government took the view that there was no urgent need to establish a Human Rights Commission, on the apparent arguments that there were ample legislative safeguards enshrined in the Basic Law, the Hong Kong Bill of Rights Ordinance, and the Discrimination Ordinances, underpinned by the strong rule of law, an independent judiciary, various

statutory bodies and institutions (such as the EOC, the Office of the Privacy Commissioner for Personal Data and the Ombudsman), and a comprehensive legal aid system, as well as the close and continuous monitoring by the Legislative Council and the media.²⁵

159. The Law Society asks the Government to re-consider the position, given the change in the socio-economic environment in recent years. The Law Society considers that there are prima facie supports for the consideration for the establishment of the Commission.

²⁵ Home Affairs Bureau, *Existing human rights protection mechanisms in Hong Kong*, LC Paper No. CB(2)1014/06-07(03), <http://www.legco.gov.hk/yr06-07/english/panels/ha/papers/ha0209cb2-1014-3-e.pdf>

CHAPTER 7: EXCEPTIONS

Consultation Question 61 P.149

Do you think that all the exceptions should be contained in one section (Schedules) of the discrimination laws in order that the law is clearer?

160. On balance, yes. The current approach to exceptions in the Discrimination Ordinances is inconsistent and confusing. The suggested amendment should ensure a clear and comprehensive statement of what is exempted from the main legislation, which will hopefully make the law easier to understand and apply.

Consultation Question 62 P.152

Do you think that the definition of genuine occupational qualifications (GOQs) should be reformed and made consistent across all the protected characteristics by defining them as:

- There is an occupational requirement which relates to a protected characteristic;
- the application of the requirement is a proportionate means of achieving a legitimate aim;
- the applicant or worker does not meet the requirement; or, the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.

In relation to the protected characteristic of disability, the exception does not apply where a reasonable accommodation can be made to perform the occupational requirement.”?

161. The proposed redefinition of GOQs would simplify the existing legislation, and could be applied across all protected characteristics set out in Chapter 2 with the benefits of improved clarity and application of the law.

162. Although the current Disability Discrimination Ordinance does not explicitly include an obligation to make reasonable adjustment for any disability, the EOC and courts have considered on a case by case basis what facilities could be afforded to an employee with a disability in determining whether an employer can successfully claim the current exceptions of inability to perform the inherent requirement or unjustifiable hardship.

163. To impose a positive duty on all employers to consider disability facilities will not always be practical or cost efficient. The cost-benefit assessment

will always vary, again on a case by case basis, depending on the size and financial resources of the employer claiming that such accommodation is unreasonable. By way of example, a small company may find it too costly, if not impossible, to reshuffle the duties of its employees to enable an employee with an illness to attend frequent medical treatment, but a large organization may find it logistically possible to do so.

- 164. Similarly, the cost of making alterations to premises' access to accommodate an employee in a wheelchair may seem unreasonable, its benefits to other users/occupants and hence the potential for cost sharing by other employers could be considered.
- 165. On balance the Law Society is not persuaded that creating a positive obligation on employers is necessary to ensure that all residents of Hong Kong have equal opportunities in employment.
- 166. Hong Kong employers are already bound by the existing legislation to ensure that they make "reasonable accommodation" to ensure that such facilities are provided unless their particular circumstances fall within the current exceptions.

Consultation Question 63 P.153

Do you think that the discriminatory training exceptions are unnecessary and should be repealed and incorporated within the scope of the definition of special measures?

- 167. Different views have been offered: one view considers that such training should not be excluded from discrimination legislation. If these measures are introduced as anticipated by paragraphs 5.12 – 5.19, the current training exceptions will become obsolete and can be repealed.
- 168. The other view is that there could be duplications or overlaps, but there is no harm in keeping the exceptions.

Consultation Question 64 P.153

Do you think that the charities exceptions should be amended to require a legitimate aim and proportionality in order to be lawful?

169. The Law Society in principle agrees including the inclusion of proportionality, but shall ask that, with respect to the concept of 'legitimate aim' in justifying conduct which would otherwise be discriminatory, they should be properly and clearly defined, and examples should be provided.

Consultation Question 65 P.154

Do you think that the Government should conduct a review of its New Territories small house policy?

170. The current New Territories small house policy is cultural anachronism that implicitly discriminates against women. Whilst a review of the small house policy is beyond the scope of the current review on discrimination, the element of discrimination it supports would be one of many reasons to justify a public enquiry into the need to continue such a policy *ad infinitum*.

Consultation Question 66 P.156

Do you think that the Government should as soon as possible repeal the exceptions in the SDO relating to sex and:

- requirements for height or weight;
- granting pension benefits to surviving spouses and children of deceased public officers?

171. Opposing views are received. For those which say yes, it is considered that if circumstances arise where, for example, for operational reasons, an employee must be of a particular size, weight or height to carry out his or her particular duties, then an employer can rely on the existing exemptions relating to GOQs and therefore there needs not be a separate statutory exemption.

172. The granting of pensions to the surviving spouses and children of deceased public officers is presumably an issue of contract, and will likely die a natural death, as the number of beneficiaries of that policy should diminish with time. The original reasons for the exemption continue to apply, and there would appear to be no good reason to remove it.

173. For those engaged post 1993, the matter should be one of policy and contract, meaning that the statutory exemption will ultimately become redundant.

174. For the naysayer, it is considered that the status quo should be maintained.

Consultation Question 67 P.156

Do you think that the exception for numbers of men and women employed in the Correctional Services Department is unnecessary and should be repealed?

175. Opposing views are received. For those which say yes, it is considered that if and to the extent there is need to maintain a particular ratio of staff, for example in security enforcement operations, the CSD could rely upon existing GOQs.
176. For the naysayer, it is considered that the status quo should be maintained.

Consultation Question 68 P.157

Do you think that the national security exception relating to sex is necessary, and if so do you agree that it should be amended to require proportionality?

177. Different specialist committees have different views. Some consider that the exception should be maintained, but proportionality and genuine justification should be taken into account, in applying for such exception.
178. Other committees consider that, without examples it is difficult to imagine circumstances which would justify discrimination on grounds of sex for the protection of national security. Ideally, therefore, the exception should be repealed, and the Government should rely on the existing GOQs to justify any imbalance. If the exception is to be retained, then it should be amended to require proportionality.

Consultation Question 69 P.158

Do you think that the exception permitting sex discrimination in employment and qualification bodies for religious purposes should be extended to permit marital status discrimination?

179. Yes. The law prohibits both marital status and sexual discrimination, but certain religions consider it a necessary feature of their faith to transcend these laws to comply with the doctrines of their respective beliefs, or to avoid offending the religious susceptibilities common to its followers. Whilst it is contrary to public policy and expectations to expand the category of those beyond the law, it is difficult to deny exemption in circumstances where the

same religious principles as facilitate sex discrimination can also apply to marital status discrimination.

Consultation Question 70 P.158

Do you think that the exception relating to providing benefits differentially based on marital status should be amended to provide equality between persons who are married and persons in a de facto relationship?

180. See our responses to Question 6 above.

181. We wish to add that the current law does not accommodate the levels of concern on de facto relationships and same sex relationships. A careful and thorough study and consultation are required before conclusion could be drawn as to whether there needs to be an expansion of the law to cover non-married couples against marital status discrimination.

Consultation Question 71 P.160

Do you think that:

- **the Human Reproductive Technology Ordinance should be amended to remove a requirement that a person is married to be provided with IVF treatment; and**
- **the exception in the SDO relating to reproductive technology should then be repealed?**

182. Yes. The HRTO is a seemingly permissive item of legislation couched in Victorian values. The exemption is inconsistent with the Adoption Ordinance and Article 22 of the Bill of Rights, and should be repealed.

183. The Law Society also repeats the observation set out in the response to Q6 above.

Consultation Question 72 P.160

Do you think that the exception relating to adoption and marital status is no longer necessary because of amendments to the Adoption Ordinance and should be repealed?

184. Yes. The law as it stands is inconsistent with the Adoption Ordinance.

185. Consideration should also be given to the desirability of recognition of the rights of same sex couple in adoption.

Consultation Question 73 P.161

Do you think that the exception to discrimination relating to the provision of public housing permitting discrimination on grounds of marital status should be repealed?

186. For the reasons provided in the above response to Question 70 this exception should be repealed.

Consultation Question 74..... P.162

Do you think that the exception relating to family status which permits difference in insurance premiums based on family status should be repealed?

187. There appears to be no logical reason to maintain this exemption.

Consultation Question 75 P.163

Do you think that the system under the Minimum Wage Ordinance by which persons with disabilities can assess their productivity has worked effectively? Do you think that the exceptions under Items 1 to 3 of Schedule 5 of the DDO should therefore be retained and/or reformed in any way or repealed?

188. The Law Society does not have views on this matter in this context, and in any event, this matter involves policy consideration.

Consultation Question 76 P.165

Do you think that the exception permitting discrimination in employment conditions for persons from overseas with special skills, knowledge or experience should be repealed?

189. No. This is an area that is already addressed on a case by case basis by the Immigration Department as a prerequisite to the grant of a working visa. To empower the EOC to participate in that exercise could duplicate unnecessarily the administrative function of the Immigration Department in assessing whether an individual has “special skills, knowledge or experience” which can be applied for the benefit of domestic employers.

Consultation Question 77 P.165

Do you think that the exception which permits differences in terms of employment for overseas and local staff for specified posts should be reviewed by the Government?

190. No. See the response to Question 76 above.

The Law Society of Hong Kong

28 October 2014

APPENDIX

The following are the extracts of judgment in *M v. Secretary for Justice* [2007] HKDC 207

“153. A comparison of these legislations shows that the wordings of our DDO are very similar to those of the Australian DDA (Cth). The requirements of the comparison exercise and that the different treatment must be made on the ground of the complainant’s disability show that the object of the Hong Kong and the Australian legislations is to ensure equality of treatment. It tries to prevent anyone from making a “coloured decision” affected by the disability of the complainant. On the other hand, the English legislation adopts a more aggressive approach. In *Purvis v State of New South Wales (HCA)* [2003] 217 CLR 92, Gummow, Hayne and Heydon JJ made the following observations about the different approaches adopted by the various jurisdictions to tackle the problem of disability discrimination:

- “ 200. *Since the [DDA (Cth)] was enacted in Australia, legislation enacted in other jurisdictions has sought to give effect not just to a principle requiring equality of treatment but to what is sometimes called a ‘substantive conception of equality’, in which the purpose is ‘to prevent or compensate for disadvantages’. (Many of the international instruments to which we were taken must also be understood in that way.)*
201. *Concepts of ‘difference’, ‘disability’ and ‘disadvantage’ all depend upon comparison. They assume that there is a person, or a group of persons, with whom it is useful and relevant to draw the comparison which is implicit in describing one person as ‘different’ or ‘disabled’, or ‘disadvantaged’. Obviously, the utility and relevance of the comparison depends upon why it is being made. Different comparisons may have to be drawn according to whether the purpose is limited to ensuring that persons situated similarly are treated alike, or the purpose is wider than that. In particular, if the purpose of legislation is to ensure equality of treatment, the focus of inquiry will differ from the inquiry that must be made if the relevant purposes include ensuring equality in some other sense, for example, economic, social or cultural equality.*
202. *‘Substantive equality’ directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the premise that ‘in order to treat some persons equally, we must treat them differently.’ Obviously, there are*

many ways in which 'substantive equality' can be defined and there are many different ways in which legislatures may seek to achieve it.

203. *The principal focus of the [DDA (Cth)], however, is on ensuring equality of treatment. In this respect it differs significantly from other, more recent, forms of disability discrimination legislation. In particular, for present purposes, it is important to notice that, unlike the [DDA (UK)], the Americans with Disabilities Act 1990 (the ADA) or the European Community Directive for 'establishing a general framework for equal treatment in employment and occupation', the [DDA (Cth)] does not explicitly oblige persons to treat disabled persons differently from others in the community. The [DDA (Cth)] does not, for example, contain provisions equivalent to ss 5 and 6 and ss 28B-28G of the [DDA(UK)] which expressly oblige employers and educational authorities to make 'reasonable adjustments' to accommodate disabled persons.*

.....

206. *Considerable care must be taken, therefore, before applying what has been said about either the aims or the effect of other forms of disability discrimination legislation from other jurisdictions to the construction of the [DDA (Cth)]. Even more care must be taken before adopting the necessarily general forms of aspirational, as distinct from normative, statements found in international instruments as an aid to resolving the particular questions of construction which now arise. Aspirational statements are commonly concerned to state goals, not to identify the particular methods by which the stated goals, not to identify the particular methods by which the stated goals will be achieved. Those international instruments to which were referred took this aspirational form."*

154. As the wordings of our DDO follow closely those of the DDA (Cth), the same observations can be made about the interpretation and the object of our DDO. In fact, HH Judge Muttrie expressed similar sentiment in *L v Equal Opportunities Commission*, *ibid.*:

".....The purpose of the [DDO] is not, as the plaintiff seems to have arguing, to make employers sympathetic or supportive to employees suffer or claim to suffer from disability, but to make them treat them not favourably they do their employees who suffer from none." (at para. 55)

155. From the aforesaid *dicta*, one can easily note the different approaches adopted by the Australian and Hong Kong legislatures on the one hand, and the English legislature on the other, regarding the protection of disability

discrimination. Apart from the difference in the comparison exercise which I will elaborate further in the latter part of this judgment (see: para. 157 below), the English legislation expressly requires “affirmative action”, i.e. duty to make reasonable adjustments for disabled persons. Further, one should also note that there is a defence in s. 4A of the DDA (UK) regarding such duty to make reasonable adjustments, if the employer does not know or could not reasonably be expected to know that the employee has a disability.”